

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Ellen Gavin
Marshall Johnson
LeRoy Koppendrayner
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Commission Investigation
into Qwest's Compliance with Section 272 of
the Telecommunications Act of 1996's Separate
Affiliate Requirement

ISSUE DATE: December 5, 2002

DOCKET NO. P-421/CI-01-1372

ORDER DENYING MOTION TO REOPEN
AND SUPPLEMENT THE RECORD

PROCEDURAL HISTORY

On September 11, 2001, the Commission issued its NOTICE AND ORDER FOR HEARING¹ for a contested case proceeding to be held on all issues relevant to Qwest's compliance with Section 271 of the Telecommunications Act of 1996 (The Act).² This case generated seven separate dockets to address different aspects of Qwest's § 271 compliance. Specifically it designated that the issue of Qwest's compliance with Section 272 of the Act (separate affiliates) be addressed in Docket No. P421/CI-01-1372, the docket herein.

In early October 2001, Qwest Corporation (the Qwest Bell Operating Company) filed its petition with the Commission seeking a finding of compliance with Section 272 of the Act. The Qwest BOC identified Qwest Communications Corporation (QCC) as the Qwest entity that would provide in-region interLATA services if Qwest were given Section 271 authority by the Federal Communications Commission (FCC).

On March 15, 2002, the Administrative Law Judge (ALJ) filed his Findings of Fact, Conclusions of Law and Recommendations. The ALJ recommended that the Commission find that Qwest failed to meet the requirements set forth in Section 272 of the Act and identified five major requirements of Section 272 with which Qwest has not demonstrated compliance. The ALJ set forth modifications that would enable Qwest to meet the 272 requirements.

Exceptions to the ALJ report were filed by Qwest and the Department of Commerce (DOC) on April 3, 2002 and by AT&T on April 5, 2002.

¹ In the Matter of an Investigation Regarding Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 with Respect to the Provision of InterLATA Services Originating in Minnesota, Docket No. P-421/CI-96-1114.

² Pub.L. No. 104-104, 110 Stat.56 (codified as amended in scattered sections of title 47, United States Code).

On April 15, 2002 Qwest filed its Reply to Exceptions of AT&T and the DOC.

On April 16, 2002, the DOC filed its Motion to Strike Qwest's filing of new evidence contained in material filed with its Exceptions to the ALJ report.

On May 1, 2002, Qwest filed its response to the DOC's Motion to Strike.

On June 18, 2002, the Commission met to consider the issues in this case. At this meeting the Commission determined that Qwest should be allowed to respond more fully to the ALJ's recommendations and that other parties should have an opportunity to address Qwest's new evidence.

On September 27, 2002, AT&T filed its Motion to Reopen and Supplement the record in light of recent events, including Qwest's restatement of its financial statements for prior periods.

On October 11, 2002, the DOC filed comments supporting AT&T's Motion to Reopen and Supplement the record in this case.

On October 11, 2002, Qwest filed comments opposing AT&T's Motion.

On October 16, 2002, Qwest filed its motion to respond to the DOC's comments and its response to the DOC comments.

On October 24, 2002, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

I. Background

Sections 271 and 272 of the Act describe the requirements that a Bell operating company (BOC) must meet to obtain authority to provide in-region, interLATA long distance authority. This Order addresses only the section 272 requirements.

Among other things, section 272 requires that a BOC establish a separate affiliate to provide in-region origination of interLATA telecommunications services, requires that the BOC obtain biennial audits to determine compliance with 272, and limits the conduct of joint marketing services by the BOC and its affiliate. Further, the BOC is required to follow Generally Accepted Accounting Principles (GAAP) when it accounts for transactions with its affiliates.

In its petition to this Commission, Qwest identified Qwest Communications Corporation (QCC) as the Qwest entity that would provide in-region interLATA services if Qwest receives the required authority from the Federal Communications Commission (FCC).

However, at the end of September, Qwest, in a filing with the FCC for interLATA authority in nine other states (not including Minnesota), introduced a new Section 272 affiliate, Qwest Long Distance Corporation (QLDC).

II. AT&T's Motion

AT&T asked that the Commission reopen the record in this proceeding and require Qwest to supplement the record with evidence to demonstrate that Qwest and its new section 272 affiliate, QLDC, are in compliance with section 272 of the Act.

It argued that the Commission should take additional evidence and compile a new record before Qwest submits an application to the FCC, arguing that the FCC would otherwise be required to make a decision without a fully developed state record.

AT&T recommended that the procedure for reviewing Qwest's filing contain the five following components:

- Qwest should file testimony and exhibits demonstrating that Qwest and its Section 272 affiliate are in compliance with Section 272;
- discovery must be permitted regarding Qwest's filing;
- competitive local exchange carriers (CLECs) and other interested parties must be given the opportunity to file comments;
- Qwest should have an opportunity to reply;
- the Commission should review the new evidence on Qwest's compliance with Section 272 before the Commission makes any recommendation on Qwest's compliance with Sections 271 and 272.

III. Comments of the DOC

The DOC supported AT&T's motion to reopen the record in this case. The DOC indicated that Qwest now has two designated 272 affiliates from which it can choose when applying for interLATA authority.

The DOC argued that new evidence presented in Qwest's new section 272 filing with the FCC demonstrates possible violations of section 272 with both 272 affiliates. The DOC argued that Qwest is fundamentally changing its pricing policy, permitting affiliate practices that may result in discriminatory behavior against competitors and introducing an entirely new section 272 affiliate. For these reasons the previous record in this proceeding is insufficient for a proper and thorough examination of Qwest's compliance with section 272.

The DOC recommended that a thorough investigation into Qwest's present compliance with section 272 is necessary before the Commission makes a final decision on this matter. Not doing so will run the risk of allowing Qwest to engage in anti-competitive activities until the first biennial audit is concluded and results are available.

IV. Comments of Qwest

Qwest opposes AT&T's Motion to Reopen and Supplement the Record. Qwest argued that there is nothing in the Act or any FCC rule or order that requires the FCC to consult with state commissions on section 272 questions nor are the states required to issue recommendations with respect to section 272. Although this Commission did conduct extensive proceedings to allow comment on Qwest's compliance with section 272, it was not required to do so then and is not required to do so now, at AT&T's request.

Qwest's refiled application with the FCC was set on an expedited comment schedule, and the FCC will decide all questions related to QLDC's compliance with section 272 by December 27, 2002, at the latest. Qwest argued that it does not make sense to reopen this proceeding and enter into further proceedings when the FCC is already reviewing the issue.

Further, the FCC will be deciding the issue of QLDC's compliance with section 272 for nine other states, and there is no reason that its decision for the nine other states would be any different than its decision for Minnesota.

Lastly, Qwest indicated that the Commission will not lose its role in these matters in the future by deferring to the FCC now. This Commission's role in the biennial section 272 audits will assure the compliance of the 272 affiliate.

V. Commission Action

The Commission will deny AT&T's motion to reopen the proceedings and supplement the record. Neither the Act nor the FCC requires the Commission to reopen this proceeding and doing so is not in the interest of administrative efficiency. Reopening this proceeding would be a misallocation of resources, considering that this issue is directly before the FCC, albeit for nine other states. For these reasons, the Commission will deny the motion.

ORDER

1. At&T's Motion to Reopen and Supplement the Record in this docket is denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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